

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

WILLIAM DAL MOLIN and CHRIS  
MALAN,

No. C 04-03879 WHA

Plaintiffs,

v.

**ORDER DISMISSING CLAIMS OF  
CHRIS MALAN AND GRANTING  
SUMMARY JUDGMENT**

COUNTY OF NAPA CONSERVATION,  
DEVELOPMENT & PLANNING  
DEPARTMENT; ED COLBY; COUNTY OF  
NAPA DISTRICT ATTORNEY'S OFFICE;  
RICHARD ZIMMERMAN; and Does 1  
through 50, inclusive,

Defendants.

**INTRODUCTION**

In this action alleging a violation of 42 U.S.C. 1983, defendants now move for summary judgment. This order finds that Chris Malan has suffered no injury and therefore lacks standing to bring suit. Accordingly, her claims are **DISMISSED**. In addition, defendants' motion for summary judgment is **GRANTED**.

**STATEMENT**

Plaintiff William Dal Molin bought an undeveloped parcel of land in St. Helena, in the heart of Napa Valley. Dal Molin wanted to build a road on this property and proceeded to do so without a permit, allegedly because he thought he was exempt. He was criminally prosecuted in

1 state court for earthmoving, grading and improvement obtaining a permit or filing an erosion  
2 control plan.<sup>1</sup>

3 This order will briefly review the underlying facts. Dal Molin first visited the Napa  
4 County Department of Conservation Development and Planning (“Planning Department”) in  
5 April of 2002, while he was still in escrow on the property. Planning technician Naomi Beattie  
6 testified that she advised Dal Molin that, because the proposed road was so long and steep, an  
7 Erosion Control Plan (“ECP”) would be necessary; she gave him the appropriate application  
8 forms (Beierle Exh. B at 35:17–37:2). She also noted a potential problem because “Napa  
9 County’s policy is not to allow roads to no where,” meaning that any road must “be affiliated  
10 with an agricultural project or structural project” (*id.* at 35:20–25). Dal Molin did not file an  
11 ECP at that time, however, testifying that he was told he was “cleared” to put a road in (Beierle  
12 Exh. A at 17:11–23). He further indicated that Larry Bogner at the Department of Public  
13 Works had confirmed he did not need a grading permit to improve his property (*id.* at  
14 21:26–22:15). Work on the road began on July 4, 2002 (*id.* at 22:16–17).

15 On July 5, 2002, defendant Ed Colby, an employee of the Planning Department, visited  
16 Dal Molin’s property in response to a neighbor’s complaint. Colby observed a freshly cut road  
17 and heard the operation of heavy equipment, suggesting that construction was in progress  
18 (Beierle Exh. C at 28:22–31:3). It was his opinion that this was a violation of Napa County  
19 Code § 18.108.070(B) and he left a “red tag” — *i.e.*, an order to comply, requiring Dal Molin to  
20 cease grading and to file an ECP as soon as possible (*id.* at 32:10–33:15). That same day,  
21 plaintiff called to explain that he had already been “given a go-ahead” (*id.* at 33:16–34:12).

22 On July 8, 2002, Dal Molin returned to the Planning Department in person, at which  
23 time he spoke with both Colby and Bogner. Bogner denied telling Dal Molin that he was  
24 exempt from filing an ECP; in fact, he would have had no authority in that regard because the  
25 Department of Public Works is completely separate from the Planning Department (*id.* at  
26

---

27  
28 <sup>1</sup> In 1991, Napa County enacted “Conservation Regulations” to protect lands from excessive soil loss  
and maintain or improve water quality of watercourses by minimizing soil erosion from earthmoving,  
land-disturbing and grading activities.

37:7–38:3). Dal Molin allegedly told Colby that he was not going to cease his project (*id.* at 38:18–23; Beierle Exh. F at 59:5–12).

On July 9, 2002, Colby sent a written notice of violation to Dal Molin, giving him thirty days to file a complete and acceptable ECP with the Planning Department (Beierle Exh. G). Dal Molin was warned that failure to do so would “result in the issuance of [a]dministrative [c]itations and/or referral to the District Attorney for action on their part” (*ibid.*).

On August 16, 2002, plaintiff’s attorney Mark Pollack wrote a letter commemorating a discussion he had that day with Patrick Lynch of the Planning Department (Beierle Exh. H). Therein, he indicated that plaintiff’s ECP was still being prepared by Drew Aspergin, but interim erosion control measures could be implemented by Douglas Nix of Osterling Oversight (*ibid.*). It was agreed that these measures would not violate the red tag order of July 5, 2002.

On August 27, 2002, Colby received a call from Randy Bryant, who said that Dal Molin’s road had been “base rocked” (Beierle Exh. F at 100:6–21).<sup>2</sup> Although Colby testified during his deposition that this “verified the fact that [Dal Molin] continued with work after being told he should not continue,” he admitted that he did not know whether the base rock was placed as an erosion control measure, at the direction of Nix (*id.* at 100:22–101:8).<sup>3</sup> On September 9, 2002, the neighbor who originally complained called to report that the road was now “blacktopped,” meaning it was fully-paved (Miller Exh. 3 at 2).

On September 24, 2002, Dal Molin submitted an ECP, but it did not include building plans for a residence (Beierle Exh. F at 101:9–23). Mary Doyle at the Planning Department concurred that the ECP was “incomplete for planning purposes” because it was a “single page as-built” that merely described what was already on the ground, not a “pre-construction” erosion control plan (Beierle Exh. J at 24:12–22; Miller Exh. 12).

---

<sup>2</sup> As the name suggests, base rock is placed as a foundation layer that stabilizes the surface of the road.

<sup>3</sup> In the state criminal proceeding, Nix submitted a declaration in which he indicated that he “never approved any further construction of the road” and, in fact, did not review or approve any erosion control measures until November 4, 2002 (Beierle Exh. I at 2). In a letter to Dal Molin, dated December 20, 2002, Nix confirmed that “[a]t the time of our meeting [on November 4], the driveway was complete and had been paved” (Miller Exh. 8).

On December 9, 2002, Steve Lederer of the Planning Department wrote a letter commemorating a discussion between Dal Molin, Colby and himself that day (Beierle Exh. K). Therein, he reiterated that the road “on the subject property was completed without an erosion control plan.” Lederer also clarified that the subsequently submitted ECP was considered “incomplete for various technical reasons, one of which being that the purpose of the road is unclear.” Apparently, Dal Molin had previously indicated that the road was intended to support a future agricultural use, but now claimed that it was for residential use; Lederer indicated that the ECP “should be revised to clearly show this planned use.” He further warned that even if the ECP were approved, the residential building plans would have to be submitted within six months of approval or the County would request removal of the road and restoration of the land to its previous undisturbed condition (*ibid.*).

\* \* \*

On October 3, 2002, Colby sent a request for legal action to defendant Richard Zimmerman at the Napa County District Attorney’s Office (Miller Exh. 3). Therein, he detailed the events leading up to his recommendation to initiate legal proceedings against the property owner (*id.* at 1-2). He included the following sentence at the end of his memorandum: “FYI William Dal Molin is Chris Malan’s father!!!!!!” (*id.* at 3).<sup>4</sup> When questioned about this during his deposition, Colby indicated that he merely thought it was “superbly ironic that the father of a well-known environmentalist in Napa County was caught violating code related to grading which is her big issue,” but this fact had no influence on his treatment of the case (Beierle Exh. F at 104:20–105:12). At trial, he denied wanting “to poke back at Chris Malan,” explaining that he did not consider her an “opponent” because her interests in enforcing the conservation regulations were aligned with those of the Planning Department (Beierle Exh. P at 17:2–13).

Dal Molin’s daughter, plaintiff Chris Malan, describes herself as an environmental activist (Malan Decl. ¶ 6). She alleges that Zimmerman never followed up on any of *her* reports of “violators of the hillside ordinances;” she claims that her father is the only person ever

---

<sup>4</sup> Lynch, Colby’s supervisor at the Planning Department, testified that at trial that he would not have “done it that way” himself, but it was just matter of stylistic preference (Miller Exh. 7 at 196:26–197:3).

1 criminally prosecuted, “despite there having been hundreds of complaints” to the Planning  
 2 Department about other individuals (*id.* ¶¶ 3–4). She believes that the criminal prosecution of  
 3 her father was intended to “seek revenge for and negatively impact [her] successful  
 4 environmental efforts” (*id.* ¶ 5). She contends that defendants’ actions have caused her entire  
 5 family “significant emotional distress, anxiety, humiliation, and reputation damage” (*ibid.*).

6 Specifically, she notes that Jeff Schechtman, a talk show host for Napa radio station  
 7 KVON, made Dal Molin’s referral to the District Attorney’s office for constructing an illegal  
 8 road the subject of his radio show on October 7, 2002 (*id.* ¶ 7). Plaintiffs assert that the referral  
 9 “was not public record and could only have been leaked to the media by defendants” (Opp. 7).<sup>5</sup>  
 10 Malan further alleges that the District Attorney’s investigation into her father’s allegedly illegal  
 11 road was “continuously and aggressively used negatively” to attack her during a 2003 political  
 12 campaign concerning the Napa County Conservation Regulations (*id.* ¶ 8).

13 Of the approximately twelve to fifteen complaints received by the Planning Department  
 14 in the time period from summer 2001 to summer 2002, probably two or three were referred to  
 15 the District Attorney (Beierle Exh. F at 45:20–46:16). Once a case is referred, the Planning  
 16 Department is no longer involved in the decision whether to initiate legal proceedings against  
 17 the alleged offenders (*id.* at 61:16–62:11). Indeed, Colby testified that while “[t]he D.A. might  
 18 ask us to make another inspection to update if it’s been a few months before they can get to the  
 19 case,” generally they forwarded “everything, even inquiries” to the District Attorney (*id.* at  
 20 61:11–15). For example, on December 17, 2002, when Colby was contacted by Mark van  
 21 Gorder about his willingness to testify that he observed continued construction on Dal Molin’s  
 22 property, he dutifully forwarded this information to Zimmerman (Miller Exhs. 15–16).

23 In a declaration filed for the state criminal proceeding, Zimmerman indicated that he had  
 24 “an impartial opinion of Ms. Malan” and bore “no ill will” towards her (Beierle Exh. N at 2).

---

25  
 26 <sup>5</sup> Plaintiffs cite no evidence in support of this contention. The only evidence in the record concerning  
 27 this issue was Pollack [Dal Molin’s attorney] testifying at trial that *his* office did not have any contact with the  
 28 radio station (Miller Exh. 4 at 381:12–15). From this, plaintiffs jump to the conclusion that defendants must  
 have “leaked” the news. Yet, Schechtman testified at his deposition that he had never had a discussion with  
 Zimmerman (or anyone else from the District Attorney’s office) about either Malan or Dal Molin; moreover, he  
 did not even know who Colby was (Beierle Exh. Q at 16:15–17:12). In any event, Schechtman is not a state  
 actor and is not a party to this action.

1 He elaborated that his “review of the referral and decision to file a complaint were entirely  
2 impartial and based solely on the facts available to [him] and the nature of the violations,” he  
3 specifically declared that “[n]either the familial relationship between the defendant and  
4 Ms. Malan nor any apparent public controversy had any bearing on [his] decision” (*ibid.*).

5 The criminal complaint was filed in the Superior Court of Napa County on July 3, 2003  
6 (Beierle Exh. M). On January 15, 2004, a jury returned verdicts of “Not Guilty” on all counts  
7 (Beierle Exh. O). This lawsuit followed.

8 The complaint, filed on September 15, 2004, alleges a single cause of action: a violation  
9 of 42 U.S.C. 1983.<sup>6</sup> Specifically, plaintiffs “allege that they were subjected to a violation of  
10 their constitutional rights to free speech, association, right to petition government, privacy, due  
11 process, equal protection, and to be free from discriminatory selective prosecution of other  
12 retaliation based upon the exercise of these rights, guaranteed by the first, fourth, fifth, and  
13 fourteenth amendments to the United States Constitution” (Compl. at 5).

14 Defendants now argue that plaintiff Chris Malan has no standing to sue. Defendants  
15 also move for summary judgment on the merits. Specifically, they argue that defendant  
16 Zimmerman is protected by absolute immunity for his activities relating to the criminal  
17 prosecution of plaintiff Dal Molin. In addition, defendants assert that plaintiffs have failed to  
18 identify a constitutional right that was violated as a result of any pattern, practice or policy.

## 19 ANALYSIS

### 20 1. PLAINTIFF CHRIS MALAN LACKS STANDING.

21 As a threshold issue, defendants argue that plaintiff Chris Malan lacks standing. The  
22 Court agrees. Standing is “an essential and unchanging part of the case-or-controversy  
23 requirement of Article III,” which limits the jurisdiction of federal courts. *Lujan v. Defenders*  
24 *of Wildlife*, 504 U.S. 555, 560 (1992). To demonstrate standing, three elements must be

---

25  
26 <sup>6</sup> This statute provides: “Every person who, under color of any statute, ordinance, regulation, custom,  
27 or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of  
28 the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or  
immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in  
equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an  
act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a  
declaratory decree was violated or declaratory relief was unavailable.”

1 satisfied. First, there must be an “injury-in-fact;” in other words, plaintiff has suffered a “an  
2 invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or  
3 imminent, not conjectural or hypothetical.” Second, a plaintiff must establish a causal  
4 connection between the injury and the conduct of the defendant. Third, it must be likely (as  
5 opposed to merely speculative) that a favorable decision will redress the injury. *Id.* at 560–61  
6 (internal citations omitted). At the summary judgment stage, mere allegations of injury no  
7 longer suffice; plaintiff must set forth specific facts by affidavit or other evidence. *Id.* at 561.

8 Here, there is no evidence in the record that plaintiff Malan has suffered *any*  
9 injury-in-fact, much less a constitutional injury. First, she had no ownership interest in the  
10 subject property and was not personally prosecuted for violating any conservation regulations,  
11 only her father was. None of defendants’ alleged actions directly affected her. Thus, even  
12 assuming *arguendo* that the criminal prosecution constituted an equal protection violation of  
13 some kind, she was not the victim. Second, although she alleges that her first amendment rights  
14 were violated, she does not allege and there is no indication in the record that the criminal  
15 prosecution of her father chilled *her* speech in anyway. Her eight-paragraph declaration was  
16 completely devoid of any allegation that she refrained from speaking, campaigning, or  
17 otherwise advocating her political causes. Third, to the extent that Malan or her father’s  
18 reputation suffered as a result of Schechtman’s radio broadcast, plaintiffs have failed to produce  
19 any evidence establishing a causal connection between this injury and defendants’ conduct.

20 For these reasons, this order finds that plaintiff Malan lacks standing to bring suit.  
21 Accordingly, her claims are **DISMISSED**.

22 \* \* \*

23 This order now addresses whether summary judgment is appropriate with respect to  
24 plaintiff Dal Molin.

25 Here, the essence of the complaint appears to be an allegation of selective prosecution in  
26 violation of 42 U.S.C. 1983. This order notes that the complaint does not contain a facial  
27 challenge to the constitutionality of Napa County Code § 18.108.070(B). Rather, plaintiffs  
28 merely argue that this section was selectively enforced.

1           **2.       LEGAL STANDARD FOR SUMMARY JUDGMENT.**

2           Pursuant to FRCP 56(c), summary judgment is proper where the pleadings, discovery  
3 and affidavits show “that there is no genuine issue as to any material fact and that the moving  
4 party is entitled to judgment as a matter of law.” A genuine dispute as to a material fact exists if  
5 there is sufficient evidence for a reasonable trier of fact to return a verdict for the nonmoving  
6 party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

7           Once the moving party meets its initial burden of demonstrating the absence of any  
8 genuine issues of material fact, the nonmoving party must “go beyond the pleadings by [its]  
9 own affidavits, or by depositions, answers to interrogatories and admissions on file, designate  
10 specific facts showing there is a genuine issue for trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317,  
11 323–24 (1986) (internal quotations omitted). “Evidence of the nonmovant is to be believed and  
12 all justifiable inferences are to be drawn in his favor.” *Anderson*, 477 U.S. at 255. Yet, it is not  
13 the task of the district court to scour the record in search of a genuine issue of triable fact.  
14 *Keenan v. Allen*, 91 F.3d 1275, 1279 (9th Cir. 1996). The nonmoving party has the burden of  
15 identifying with reasonable particularity the evidence that precludes summary judgment. *Ibid.*

16           **3.       PLAINTIFFS’ § 1983 CLAIM OF SELECTIVE PROSECUTION FAILS.**

17           The defense of qualified immunity protects individual defendants Zimmerman and  
18 Colby from § 1983 liability “when performing discretionary functions, unless such conduct  
19 violates a clearly established constitutional or statutory right of which a reasonable person  
20 would have known.” *Jackson v. City of Bremerton*, 268 F.3d 646, 650 (9th Cir. 2001).<sup>7</sup> In  
21 analyzing whether qualified immunity applies, we look to three inquiries: (1) the identification  
22 of the specific right allegedly violated; (2) the determination of whether that right was so  
23 “clearly established” as to alert a reasonable officer to its constitutional parameters; and (3) the  
24 ultimate determination of whether a reasonable officer could have believed lawful the particular  
25 conduct at issue. *Ibid.*

26  
27  
28           

---

 <sup>7</sup> On August 1, 2005, the Court approved a stipulated dismissal of all claims against Zimmerman and Colby in their individual capacities, but not in their official capacities.

Whether a constitutional right has been violated is a “threshold question.” *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Here, Dal Molin fails to clearly identify exactly what constitutional right was violated. This order observes that the complaint was vaguely drafted in the sense that plaintiffs alluded to multiple constitutional violations without explaining any particular theory in detail. The essence of the complaint, however, appears to be an allegation that Dal Molin was selectively prosecuted.<sup>8</sup>

Ordinarily, “so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.” *United States v. Armstrong* 517 U.S. 456, 464 (1996)(internal citation omitted). To prevail on a selective prosecution claim, a plaintiff must prove that members of an identifiable class were singled out for enforcement of the law while nonmembers of the class were not prosecuted. *Id.* at 465 (“The claimant must demonstrate that the . . . prosecutorial policy had a discriminatory effect and that it was motivated by a discriminatory purpose.”). In other words, the decision whether to prosecute may not be “deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.” *Oyler v. Boles*, 368 U.S. 448, 456 (1962). On the other hand, “[m]ere selectivity in prosecution creates no constitutional problem.” *United States v. Steele*, 461 F.2d 1148, 1151 (9th Cir. 1972).

Selective prosecution claims are judged “according to ordinary equal protection standards.” *Wayte v. United States*, 470 U.S. 598, 608 (1985). The first step in equal protection analysis is to define the classes to be compared. “The goal of identifying a similarly situated class . . . is to isolate the factor allegedly subject to impermissible discrimination. The similarly situated group is the control group.” *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1187 (9th

---

<sup>8</sup> Despite their repeated references to “selective prosecution” and “malicious prosecution” as if these causes of action were one and the same, plaintiffs do not seem to be alleging a claim of malicious prosecution under 42 U.S.C. 1983. To succeed on such a claim, a plaintiff must demonstrate (1) tortious conduct in violation of state law and (2) intent to deprive the plaintiff of a constitutional right. *Poppell v. City of San Diego*, 149 F.3d 951, 961 (9th Cir. 1998). The elements of malicious prosecution under California law are: (1) initiation of criminal prosecution; (2) malicious motivation; and (3) lack of probable cause. *Usher v. City of Los Angeles*, 828 F.2d 556, 562 (9th Cir. 1987). Here, plaintiffs never alleged (and have failed to present supporting evidence) that defendants initiated criminal proceedings without probable cause.

1 Cir. 1995)(internal citation omitted). The next step is to determine the level of scrutiny  
2 required. Finally, the classes must be compared to show there was a discriminatory effect.

3 Here, plaintiffs have not explicitly identified what the two classes would be. It was  
4 never alleged that Dal Molin himself was attempting to exercise *his* First Amendment rights of  
5 free expression; only his *daughter* is an environmental activist. Thus, this order proceeds under  
6 the assumption that Dal Molin's hypothetical class would be persons in violation of Napa  
7 County Code § 18.108.070(B) who are themselves environmental activists or are intimately  
8 associated with environmental activists, while the similarly-situated class would consist of all  
9 other individuals allegedly in violation of that section.<sup>9</sup>

10 Plaintiffs initially failed to set forth any specific facts that individuals in the  
11 similarly-situated class were not prosecuted for grading violations. No motion was made under  
12 FRCP 56(f) for further affidavits or depositions. Malan merely proffered generalized and  
13 conclusory allegations that Zimmerman did not follow up on *her* referrals of grading violations  
14 and that "hundreds" of violations are not criminally prosecuted (Malan Decl. ¶¶ 3–4). Yet,  
15 plaintiffs did not name a single individual or identify a single parcel of land as an example.  
16 Counsel was explicitly warned at oral argument that this offer of proof was grossly inadequate.

17 This order emphasizes that the deadline for fact discovery was July 8, 2005. Plaintiffs'  
18 counsel was already admonished once (during a telephone conference on July 8, 2005) for  
19 waiting until the last minute to resolve discovery disputes. At the hearing on August 4, 2004,  
20 however, it was revealed that the parties had stipulated to extend their discovery deadline.  
21 Although the Court did not approve of any such extension, the parties were given additional  
22 time to supplement the summary-judgment record.

23 Plaintiffs have now submitted documents pertaining to all complaints made to the  
24 Planning Department between 1995–2003 (Miller Exh. 17), additional deposition testimony (*id.*  
25 Exhs. 18–21) and a declaration by Dal Molin. The record reflects a system wherein the  
26 Planning Department receives complaints, refers some of these to the District Attorney's office,

---

27  
28 <sup>9</sup> By assuming this for the sake of argument, the Court is not vouching that this would be a cognizable class. This order also declines to speculate what level of scrutiny would be appropriate for such a classification.

1 which then prosecutes some individuals but not others. At Zimmerman's deposition, plaintiffs'  
2 counsel indicated that there were a total of ten referrals to the District Attorney's office during  
3 this time period (Suppl. Reply Exh. 80:10–81:19). Plaintiffs' supplemental brief, however, then  
4 asserted there were only five referrals out of one hundred forty-eight complaints from 1995 to  
5 2003; for the particular ordinance under which Dal Molin was charged, there were only two  
6 criminal prosecutions (namely, Dal Molin and Jeffrey Abbett) out of seventy complaints (Suppl.  
7 Br. 2–3). Defendants disagree, stating there were twelve referrals from 1996 through 2002  
8 (Suppl. Reply Br. 1). Regardless of which side counted correctly, for the purposes of this  
9 motion, it is unimportant exactly how many complaints were referred or ultimately prosecuted.

10 The now-supplemented record, even when viewed in the light most favorable to  
11 plaintiffs, still does not allow the inference that Colby's decisions to refer particular cases or  
12 Zimmerman's decisions to prosecute were targeted only towards environmental activists or their  
13 families. No reasonable jury could so find on this record. The materials submitted do not  
14 identify which individuals, if any, were connected to pro-environment causes. It is undisputed  
15 that Dal Molin was *not* the only individual criminally prosecuted for a violation of Napa County  
16 Code § 18.108.070(B). There is no evidence that Abbett, the other such person, was himself an  
17 environmental activist (or related to one). Indeed, it is impossible to determine from this record  
18 whether *any* persons referred or prosecuted were members of this group. Conversely, it is also  
19 impossible to determine whether everyone else was *not* in this group.

20 Zimmerman characterized Abbett's case as "a very similar situation of grading a road  
21 up a hill, no water course involvement, no ECP and a single person without a business entity"  
22 (Suppl. Reply Exh. 53:24–54:1). He explained that his decision whether to proceed with a civil  
23 or a criminal action was governed by various considerations, although generally he preferred to  
24 "go civil." First, he would determine whether it was a business entity that could be subjected to  
25 liability under California Business and Professions Code § 17200 *et seq.*, under which civil  
26 penalties are available. If the referral concerned an individual, then he would consider whether  
27 violations of California Fish and Game Code § 1600 *et seq.* or § 5650 *et seq.* could apply, under  
28

1 which a prosecutor could choose to bring charges either criminally or civilly.<sup>10</sup> But, “[i]f it  
 2 [was] a single person, no business and no Fish and Game, [he was] limited to a criminal  
 3 remedy” because common law actions for negligence or nuisance were unsatisfactory  
 4 alternatives (*id.* at 16:10–22:18). Both of the cases that ultimately led to criminal prosecutions  
 5 fell into this category. In short, the evidence suggests that Abbett was a similarly-situated  
 6 individual whose case was treated exactly the same.

7 As for the issue of whether there is any proof of *Colby*’s discriminatory intent, plaintiffs  
 8 assert that his comment to Zimmerman is “the proverbial smoking gun” (Opp. 7). This order  
 9 recognizes that Colby’s statement is open to interpretation. It could reflect an improper  
 10 motivation for referring the case to the District Attorney’s office. On the other hand, it could be  
 11 simply what he claims, a mere footnote underscoring the irony of the situation. But the key  
 12 point is that the record currently before the Court would not allow any reasonable jury to  
 13 conclude that a similarly-situated *class* was treated differently. Because that is case-dispositive,  
 14 it is irrelevant what Colby’s statement meant or what his intentions were. Nor is there evidence  
 15 that Colby “improperly exerted pressure on the prosecutor,” such that he would not be shielded  
 16 from liability. *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1067 (9th Cir. 2004).

17 \* \* \*

18 Summary judgment for a defendant is appropriate when the plaintiff fails to make a  
 19 showing sufficient to establish the existence of an element essential to that party’s case, and on  
 20 which that party will bear the burden of proof at trial. *Celotex*, 477 U.S. at 322. Accordingly,  
 21 summary judgment in favor of Zimmerman and Colby is **GRANTED**.

22 Plaintiffs likewise fail to point to evidence in the record reflecting any official policy or  
 23 custom of selective prosecution by the Planning Department or the District Attorney’s office  
 24 that would be necessary to establish municipal liability. *Monell v. Dep’t of Social Services*, 436  
 25 U.S. 658, 690 (1978). As such, summary judgment in favor of the municipal defendants is also  
 26 **GRANTED**.

27 \_\_\_\_\_  
 28 <sup>10</sup> Plaintiffs attempt to use John Alimpic as an example of an individual, rather than a business, against  
 whom civil charges were brought, but as Zimmerman explained, he was able to proceed under the Fish and  
 Game sections in that case (Suppl. Reply Exh. at 73:6–75:15).

1 In light of these holdings, this order need not reach the issue of whether defendant  
2 Zimmerman's decision to prosecute after Colby's referral was "intimately associated with the  
3 judicial phase of the criminal process" or merely investigative. If the former, then absolute  
4 immunity would shield him from liability; if the latter, then only qualified immunity would  
5 apply. *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976). To the extent that plaintiffs are merely  
6 challenging Zimmerman's decision to prosecute Dal Molin criminally, rather than civilly, this  
7 would clearly be an integral part of "initiating a prosecution," protected by absolute immunity.  
8 *Id.* at 431. As explained above, however, summary judgment in defendants' favor would still  
9 be appropriate even if qualified immunity applied.

#### 10 CONCLUSION

11 For the aforementioned reasons, plaintiff Chris Malan's claims are **DISMISSED**.  
12 Defendants' motion for summary judgment with respect to plaintiff William Dal Molin is  
13 **GRANTED**. This case is now over as to all parties. Judgment will be entered accordingly.

14  
15 **IT IS SO ORDERED.**

16  
17 Dated: August 17, 2005



18 WILLIAM ALSUP  
19 UNITED STATES DISTRICT JUDGE  
20  
21  
22  
23  
24  
25  
26  
27  
28